into interstate and intrastate components.[54] Examining the second element necessary for preemption (that state regulatory policies frustrate federal regulatory policies), the FCC contrasted: (a) its decision not to require information service providers or non-dominant telecommunications services providers to obtain FCC certification before providing service and not to require them to file tariffs with the FCC, and (b) Minnesota's effort to impose entry and rates regulation on Vonage.[55]

This contrast between federal non-regulation of entry and rates and state regulation of those matters is the key to understanding the Order. The FCC found that, because Vonage could not determine whether specific nomadic VoIP calls were interstate or intrastate, Vonage could not avoid the burden of complying with Minnesota's certification and tariffing requirements by declining to carry Minnesota intrastate calls, and therefore Minnesota's policy of entry and economic regulation prevented Vonage from taking advantage of the federal policy that there be no such entry or economic regulation. In this way, Minnesota entry and rate regulation frustrated federal regulatory policy.[56] This satisfied the second preemption element.

In this case, there is no conflict between federal assessment of interstate nomadic VoIP revenue and state assessment of intrastate nomadic VoIP revenue. State assessments complement rather than "negate" federal policies, so the second preemption element is not met. Vonage does not have to obtain an FCC certificate before providing domestic service, nor must it file a FCC tariff, but it must contribute to the federal USF. The FCC has never adopted a policy against federal (or state) USF assessment of VoIP revenues. Its *Amicus Curiae* brief explains:

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[54] *Vonage Preemption Order* at ¶ 30.
[55] *Vonage Preemption Order* at ¶¶ 20, 21.
[56] *See Vonage Preemption Order* at ¶ 30.

> In the *Vonage Preemption Order*, the FCC found that Minnesota's entry and tariff regulations of Vonage's service conflicted with the FCC's deregulatory policies applicable to the interstate component of Vonage's service. The FCC did not address, let alone preempt, the state-level universal service obligations of interconnected VoIP providers, which the FCC has distinguished from traditional 'economic regulation.'...
>
> [T]he NPSC USF Order does not present a conflict with the FCC's rules or policies. Rather, the NPSC's decision to require interconnected VoIP providers to contribute to the state's universal service fund, and the contribution rules that the NPSC established to implement its decision, are fully consonant with the FCC's rules and policies and are contemplated by § 254(f) of the Act. Thus, in these specific circumstances, the rationale of the *Vonage Preemption Order* provides no basis to conclude that the FCC has preempted Nebraska's state universal-service contribution requirement.

FCC Amicus Curiae Brief at 14-15 (8th Cir. Case No. 07-1764) (Aug. 5, 2008) (Ex. A hereto).

The Eighth Circuit did not find that there was a policy conflict between state USF assessments and federal USF assessment. Instead, the Court quoted the following passage from the *Vonage Preemption Order* as supporting "[a] reasonable interpretation" that the FCC had created a requirement that the FCC pre-approve any state regulation of nomadic VoIP service:

> In this [Order], we preempt an order of the Minnesota Public Utilities Commission... applying its <u>traditional "telephone company" regulations</u> to Vonage's DigitalVoice service, which provides voice over Internet protocol (VoIP) service and other communications capabilities. We conclude that Digital Voice cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules. In so doing, we add to the regulatory certainty we began building with other orders adopted this year regarding VoIP... by making clear that <u>this Commission, not the state commissions, has the responsibility and obligation to decide whether ***certain*** regulations apply to Digital Voice and other IP-enabled services having the same capabilities</u>

564 F.3d at 905 (quoting *Vonage Preemption Order*, ¶ 1) (emphasis added). The Court cited the portion of this passage in which the FCC says that the "Commission, not the state commissions" decides whether "***certain*** regulations" can be applied to nomadic VoIP providers. As noted, the Court concluded that the FCC "could" decide to approve assessment of intrastate revenues. *Id.*

The "***certain*** regulations" that the FCC was referring to in the *Vonage Preemption Order* must be some regulations, but not all regulations – otherwise there was no need for the qualifier "certain." More specifically, "certain regulations" must refer to state regulations which conflict with federal policy and so trigger preemption when calls cannot be jurisdictionally separated.

With regard to state regulations which do conflict with federal policy, the FCC rather than the state commissions does indeed have the "responsibility" to approve those regulations before they can go into effect, because the FCC would need to make a finding that the regulation no longer conflicts with federal policy in order to remove the pre-existing preemption.[57] But there is nothing in the *Vonage Preemption Order* to suggest that state regulations which never conflicted with federal policies in the first place require any sort of advance FCC pre-approval. State law is either preempted or not preempted. There is no ***procedural*** hurdle requiring states to obtain FCC clearance before promulgating state rules that do not negate federal policies.

In its *Amicus Curiae* brief, the FCC states flatly that it did not preempt the NPSC rules at issue. This means that the FCC did not adopt any general pre-approval requirement, as it has never explicitly pre-approved state USF assessments on intrastate nomadic VoIP revenue. Requiring states to come to the FCC for pre-approval each and every time they promulgate or substantially revise rules applying to nomadic VoIP providers that do not conflict with the FCC policy against entry or rate regulation (e.g. rules regarding universal service contributions, 911 program contributions, and prevention of slamming) could flood the FCC with state petitions. There is no reason to go in that direction. The President recently reminded all agencies of his policy of confining preemption to narrow limits. *See the President's Memorandum for the*

[57] As the FCC subsequently explained in the *VoIP Contribution Order*, the pre-existing preemption will also be removed if a provider develops the means to separate the service into interstate and intrastate components. *VoIP Contribution Order*, ¶ 56.

Heads of Executive Departments and Agencies on Preemption (May 20, 2009) (supplied as Ex. D).

Subsequent FCC orders demonstrate that the decision to preempt state entry and economic regulation did not extend to state USF assessments of nomadic VoIP revenue. The *VoIP 911 Order*, issued just 8 months after the *Vonage Preemption Order*, notes with apparent approval the fact that states were requiring that VoIP providers contribute financially to state 911 programs.[58] The *VoIP Contribution Order* explains that the "discussion of section 230 in the Vonage Order cautioning against regulation [of VoIP] was limited to 'traditional common carrier economic regulations' and so did not cover universal service."[59] The *Embarq Broadband Forbearance Order* distinguishes "economic regulation" from universal service obligations and other "non-economic regulations designed to further important public policy goals."[60]

3. It is Not "Manifestly Unjust" to Enforce Existing State Assessments.

The nomadic VoIP providers have no reliance interest that would require the FCC to limit to prospective-only effect a declaratory order confirming that it has not preempted state USF assessments of intrastate nomadic VoIP revenue. Because declaratory rulings construe existing law, they generally apply retrospectively as well as prospectively. For example, in its declaratory ruling that AT&T's enhanced pre-paid calling card service was a

[58] *First Report and Order and Notice of Proposed Rulemaking, In the Matter of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, 20 FCC.Rcd. 10245, ¶ 52 (2005). State financial contribution requirements, whether for USF or 911, are distinct from rules requiring nomadic VoIP providers obtain state approval of 911 compliance plans before entering the market. The latter category of rules are a form of entry regulation and so are preempted. *See Vonage Preemption Order*, ¶ 42 ("Because Minnesota inextricably links pre-approval of a 911 plan to become certificated to offer service in the state, the application of its 911 requirements operates as entry regulation.")

[59] *VoIP Contribution Order* at ¶ 49, n. 166.

[60] *Embarq Broadband Forbearance Order*, 222 FCC Rcd. 19478, 19481, ¶ 5 (2007).

telecommunications service, the FCC directed payment of universal service contributions on past calls, and the D.C. Circuit affirmed.[61] A prospective-only limitation is appropriate only if necessary to avoid "manifest injustice" resulting from reasonable reliance on a "settled rule."[62]

Before making these assessments on nomadic VoIP providers, States Petitioners provided public notice of administrative proceedings in which they adopted contribution requirements, so nomadic VoIP providers have been on notice at all times that State Petitioners were imposing contribution obligations on them.[63]

C. **By Designating a Uniform "Safe-Harbor" Mechanism that States May Elect to Use to Determine State-Specific Intrastate Revenue, the FCC Can Assist States in Eliminating Any Risk of Duplicative Assessments**

State Petitioners request a second declaratory order or rule[64] addressing the calculation of ***state-specific*** intrastate revenues for purposes of assessment. Specifically, State Petitioners request that the FCC declare that states have the discretion to adopt any mechanisms that do not assess interstate revenues and that contain procedures designed to ensure that no provider pays assessments to more than one state on the same intrastate revenues. This will give the states

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[61] "The Commission action [a declaratory ruling] constituted adjudication. Retroactivity is the norm in agency adjudications no less than in judicial adjudications. [W]e have drawn a distinction between agency decisions that substitut[e]... new law for old law that was reasonably clear and those which are merely "new applications of existing law, clarifications, and additions. ...The latter carry a presumption of retroactivity that we depart from only when to do otherwise would lead to "manifest injustice. The Commission's decision in this case did not change settled law; AT & T does not and indeed cannot point us to a settled rule on which it reasonably relied." *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

[62] *Id.*

[63] The NPSC is enjoined from collecting universal service assessments from Vonage.

[64] While State Petitioners believe that the initial order confirming the basic principle that the FCC is not preempting (and has not preempted) state USF assessments of intrastate nomadic VoIP revenue should be a declaratory ruling, it its less important whether a follow-up order addressing allocation of intrastate revenues among the states is a rule or a declaratory ruling.

flexibility to iron out any inconsistencies that could possibly result in duplicative assessments by two or more states.

Further, to minimize the disruption to universal service programs resulting from preemption litigation, the FCC should designate a "safe harbor" mechanism that states may elect to use to determine state-specific intrastate revenue. States which utilize the safe-harbor mechanism would be using a uniform methodology and so would not generate any conflicting assessments with each other. Accordingly, any state which utilizes that FCC-approved safe-harbor would be protected from preemption litigation. That would be a strong incentive for states to elect to utilize the safe-harbor. A state which does not elect to use the safe-harbor could still avoid duplicative assessments by a variety of means, including by excluding revenues assessed by another state from the assessable revenue base or granting appropriate credits.

1. Billing Address.

The first potential safe-harbor is to allocate to each state the intrastate revenues from customers with a billing address in that state. This is the approach the NPSC adopted. It is administratively simple and non-burdensome because providers already maintain a billing address for each account in order to render bills. Billing address can be relatively easily verified in any audit and the computation is simple. Where a business customer has operations in multiple states but only one billing address, then pursuant to NPSC rules, the provider may develop an intrastate service allocation factor and remit the universal service fund surcharge based upon that factor.[65]

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[65] Notably, in *Vonage v. NPSC*, the Eighth Circuit did not express any concern with that possibility that the nomadic VoIP customer might roam and make calls outside the state in which his or her billing address is located – its concern was with the possibility of two states using inconsistent proxies. *See* 564 F.3d at 906. As the D.C. Circuit held in affirming the FCC's (Continued)

2. **Registered 911 Addresses.**

A second potential uniform safe harbor mechanism is to allocate intrastate revenues to the state in which the customer registers his physical address for purposes of 911 calling. The FCC's rules already require nomadic VoIP providers to encourage their customers to report an actual physical service address from which calls are being made so that 911 calls can be accurately routed to a nearby 911 center. 47 CFR 9.5(d).

The KCC currently uses the customer's primary service address, which under this FCC rule should be the registered 911 address, to determine Kansas intrastate revenues. As noted above, during the interim period before a national safe harbor is established, the KCC and the NPSC will exclude from assessable intrastate revenue any revenues that are assessed by another state USF due to differences in assessment methodologies. Therefore, for example, the two states would not both assess revenues earned from any customers who might have a Nebraska billing address but a Kansas primary service address (registered 911 location). It is doubtful that a large number of customers would fall in that category.

Customers have obvious personal safety incentives to register 911 addresses that match their actual physical location at the time they place a call and can update their registered 911 address as they travel. If registered 911 address becomes the national safe harbor, then, for those customers who decline to establish a registered 911 address, billing address would serve as the back-up safe harbor mechanism.

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selection of 64.9% as the safe harbor for dividing VoIP revenues into interstate and intrastate components, "perfect precision" is not required and "some inevitable imprecision" is accepted in estimating the revenues falling in the different jurisdictions for purposes of assessing universal service contributions. *Vonage Holdings Corp.*, 489 F.3d at 1242.

3. FCC Form 499-A Allocations.

A third potential safe-harbor could be implemented by the FCC itself by refining the Form 499-A filings nomadic VoIP providers already make with USAC and distributing those filings to state USFs. In addition to requiring a breakdown between interstate and intrastate revenue, Form 499-A already requires that nomadic VoIP providers break revenue down into eight multi-state regions.[66] For example, line 509 requires reporting of revenues in Arkansas, Kansas, Missouri, Oklahoma, and Texas. Other lines require reporting of revenues from other regional groups of states. Logically, providers must add up revenues relating to each state to supply these region-level calculations. As a next step, they can break out each state's revenue portion to determine individual state contribution bases. Thus, under this approach, interconnected VoIP providers can adapt the methodology they already use for Form 499 to calculate state-by-state revenue components. This approach prevents duplicative assessments by giving VoIP providers themselves the initial responsibility for allocating their revenue among the states, subject to audit and review.

Each of these possible safe-harbors, if approved by the FCC, could serve as a uniform allocation methodology and avoid conflicts among state assessments. They vary in the enforcement issues they present. Because not all states have state USFs and assessment rates vary among states USFs, both billing address and registered 911 location may be superior to a system in which providers decide how they allocate intrastate revenue among states.

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[66] *See* FCC Form 499A Lines 503-510 and Instructions Page 31 (In completing Lines 503-510 "Carriers and interconnected VoIP providers should calculate or estimate the percentage of revenue they billed in each region based on the amount of service they actually provided in the parts of the United States listed for each region").

IV. CONCLUSION

In order to maintain sufficient federal and state universal service support as required by Section 254(b)(5) of the FCA, the FCC should declare that state USF assessment of intrastate nomadic VoIP revenue is not preempted and has not been preempted, so long as the state does not assess interstate revenue. The FCC should also declare that states may utilize any method for allocating intrastate nomadic VoIP revenue among states for purposes of assessment that contains procedures designed to prevent duplicative assessment of the same intrastate revenue by two or more states. Finally, in a follow-up declaratory order or rule, it should establish a uniform safe-harbor mechanism that states may utilize to perform this allocation without being exposed to disruptive preemption litigation.

Dated this 16th day of July, 2009.

Respectfully submitted by:

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The Kansas Corporation Commission

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EXHIBIT A

FCC *AMICI CURIAE* BRIEF

BRIEF FOR AMICI CURIAE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION SUPPORTING APPELLANTS' REQUEST FOR REVERSAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 08–1764

VONAGE HOLDINGS CORP. AND VONAGE NETWORK INC.,

Plaintiffs-Appellees,

v.

NEBRASKA PUBLIC SERVICE COMMISSION ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Administrative Decisions

Page

Statutes and Regulations

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NO. 08–1764

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BRIEF FOR AMICI CURIAE UNITED STATES AND
FEDERAL COMMUNICATIONS COMMISSION SUPPORTING
APPELLANTS' REQUEST FOR REVERSAL

STATEMENT OF INTEREST

The district court in this case issued a preliminary injunction that bars Defendant-Appellant Nebraska Public Service Commission (NPSC) from requiring Plaintiffs-Appellees Vonage Holdings Corporation and Vonage Network, Inc. (collectively, Vonage) to contribute to Nebraska's universal-service program. The district court granted such relief on the basis of its determination that Vonage was likely to prevail on its claim that the Federal

Communications Commission (FCC) had preempted the NPSC's state universal service contribution requirement.

The district court's decision raises several issues of substantial interest to the FCC. First, the FCC has an important interest in ensuring that the courts correctly interpret the agency's precedents, especially where, as here, that precedent is construed to overturn a state's exercise of regulatory authority. Second, the FCC has a substantial interest in promoting universal service in an equitable and nondiscriminatory manner, as Congress directed in the Communications Act of 1934. *See* 47 U.S.C. § 254(b)(4). Third, the FCC has an interest in preventing the regulatory uncertainty that would result if the courts were to address in the first instance important legal and policy questions that are the subject of pending agency rulemaking proceedings—such as the question of how Internet telephony services such as Vonage's should be classified and regulated under the Communications Act.

For these reasons, and because we believe this Court would benefit from the FCC's considered views regarding federal and state authority over Internet telephony services, the United States and the FCC submit this amicus brief to urge the Court to reverse the district court's preliminary injunction in this case. The government is authorized to participate as amicus curiae by Rule 29(a) of the Federal Rules of Appellate Procedure and has filed with this Court a motion for leave to file this amicus brief out of time.

STATEMENT OF ISSUE

This amicus brief addresses the following issue: Whether the district court erred when it concluded that FCC precedent likely preempted the application of the NPSC's state universal-service contribution requirements to Vonage, a provider of interconnected Voice-over-Internet-Protocol service.

STATEMENT

1. Voice-over-Internet-Protocol (or VoIP, for short) refers to a technology that allows end users to engage in voice communications over a broadband Internet connection. *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007) (*MPUC*). Some VoIP services are "fixed," which means that the end user can use the service from only one location (such as the end user's home). *Id.* at 575. Vonage, however, provides a VoIP service that is "nomadic": its customers can place and receive VoIP calls from any broadband Internet connection anywhere in the world. *Ibid.* Vonage's VoIP service is also "interconnected," which means that its customers can place calls to, and receive calls from, anyone with a telephone connected to the traditional public switched telephone network (PSTN). *Id.* at 574; *see also* 47 C.F.R. § 9.3 (defining "interconnected VoIP service").

The development and growth of interconnected VoIP service present difficult regulatory issues under the Communications Act. One such issue is how this service should be classified and regulated. Under the Communications Act, it has been argued that interconnected VoIP service could be regarded as a "telecommunications service" – which is subject to common-carrier regulation under Title II of the Communications Act, 47 U.S.C. §§ 201-276 – because it is often viewed by consumers as a substitute for traditional telephone service. Or, it has been argued, interconnected VoIP service could be classified as an "information service" – which is subject to minimal regulation – because it employs Internet technology. *See* 47 U.S.C. § 153(20), (47) (defining "information service" and "telecommunications service"); *see also MPUC*, 483 F.3d at 575, 577-78. The FCC has an open rulemaking proceeding in which it is considering the regulatory classification issue. *See IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

Another important issue concerns the extent to which the states can regulate the intrastate component of a nomadic VoIP service, such as the one provided by Vonage. The Communications Act generally grants the FCC exclusive jurisdiction over interstate (and international) communications, while leaving the regulation of intrastate communications to the states. *Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004); *see* 47 U.S.C. § 152(b). But the

FCC may preempt state regulation under the so-called "impossibility exception" in situations where "(1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, *i.e.*, state regulation would conflict with federal regulatory policies." *MPUC*, 483 F.3d at 578; *see also Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). In the case of nomadic VoIP, at least one side of the communication always takes place "in cyberspace," *MPUC*, 483 F.3d at 574, making it difficult for providers to pinpoint the exact geographic location of one or both ends of a call for purposes of determining whether that call originated and terminated in the same state (and is therefore subject to state jurisdiction) or in different states (and is therefore subject to federal jurisdiction). Consequently, the FCC has the authority to preempt state regulation under the impossibility exception to ensure that valid federal regulatory objectives applicable to VoIP services are not frustrated. *Id.* at 576.

The FCC exercised that preemption authority in 2004 with respect to Minnesota's attempt to impose "traditional 'telephone company' regulations" to Vonage's VoIP service. *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) (*Vonage Preemption Order*), *aff'd*, *MPUC*, 483 F.3d 570. The state regulations at issue in that case required

Vonage to obtain a state certificate and meet other entry conditions before providing intrastate service in Minnesota, and then to provide such service pursuant to tariff. *Id.* at 22408-09 ¶¶ 10-11 & n.30, 22430-31 ¶ 42 & n.148, 22432 ¶ 46.

The FCC found that those regulations conflicted with important federal policies applicable to the interstate component of Vonage's service. As the FCC explained, if interconnected VoIP service were to be classified as a telecommunications service, the state's certification and tariffing requirements would frustrate the FCC's policy of removing entry barriers and tariffing requirements in competitive telecommunications markets; on the other hand, if Vonage were to be considered an information-service provider, Minnesota's requirements would frustrate the FCC's policy of minimizing regulation of information services. *Id.* at 22415-18 ¶¶ 20-22. The FCC also found that "[t]here is, quite simply, no practical way to sever [Vonage's service] into interstate and intrastate communications that enables [Minnesota] to apply [its laws] only to intrastate calling functionalities without also reaching the interstate aspects" of the service. On the basis of those two findings – inseverability *and* frustration of federal purpose – the FCC concluded that preemption was necessary. *Id.* at 22423-24 ¶ 31. On review, this Court affirmed the FCC's preemption decision. *MPUC*, 483 F.3d 570.

2. The Communications Act establishes "the preservation and advancement of universal service" as an important federal policy goal. 47 U.S.C. § 254(b). To promote that goal, the Act requires "[e]very telecommunications carrier that provides interstate telecommunications services [to] contribute, on an equitable and nondiscriminatory basis" to the federal universal-service program. 47 U.S.C. § 254(d). The Act also authorizes the FCC, in its discretion, to extend the contribution requirement to "[a]ny other provider of interstate telecommunications ... if the public interest so requires." *Ibid.*

In 2006, the FCC adopted rules requiring interconnected VoIP providers to contribute to the federal universal-service fund. *See Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7536 ¶ 34 (2006) (*VoIP USF Order*), *aff'd in part and rev'd in part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007). Because the FCC has not yet determined whether interconnected VoIP service should be classified as a telecommunications service (and thereby subject to the Act's mandatory contribution obligation), the FCC invoked its permissive authority under § 254(d) over "provider[s] of interstate telecommunications" and concluded that requiring interconnected VoIP providers to contribute to universal service was in the public interest. The Commission explained that interconnected VoIP providers, like other fund contributors, "benefit from universal service because much of the appeal of their services to consumers derives from the ability to place calls to and receive calls from the PSTN." *Id.* at 7540-41 ¶ 43. The Commission also concluded that requiring interconnected VoIP providers to contribute to universal service would promote the "principle of competitive neutrality" by "reduc[ing] the possibility that carriers with universal service obligations will compete directly with providers without such obligations." *Id.* at 7541 ¶ 44.

Contributions to the federal universal-service fund are calculated on the basis of the end-user revenues that contributors earn from their provision of interstate (and international) telecommunications; revenues from intrastate communications are not used to calculate federal contribution amounts. Because of the difficulty that nomadic interconnected VoIP providers have in identifying interstate calls, the FCC established a "safe harbor" under which an interconnected VoIP provider may presume that 64.9 percent of its revenues arise from its interstate operations. *VoIP USF Order*, 21 FCC Rcd at 7544-45 ¶ 53. In the alternative, an interconnected VoIP provider also may conduct a traffic study to estimate the percentage of its revenues that derive from interstate traffic and use that percentage to calculate its contribution amount.

Id. at 7547 ¶ 57.[1] Finally, VoIP providers that are able to track the jurisdiction of their calls may calculate their federal contribution amounts using actual revenue allocations. *Id.* at 7544-45 ¶ 53.

3. The Communications Act provides that "[a] State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). Consistent with that provision, and like many other states, Nebraska has established its own state universal-service fund. *In re Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for administration of the Nebraska Universal Service Fund*, App. No. NUSF-1, Prog. No. 18 (April 17, 2007) (*NPSC USF Order*), at 3-4. Contributions to the Nebraska state universal-service fund are calculated solely on the basis of telecommunications companies' intrastate revenues. *Id.* at 4.

In the order at issue in this case, the NPSC concluded that interconnected VoIP providers were among the entities required to contribute to the state's universal-service fund. *NPSC USF Order* at 2. To determine the revenue base

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[1] The FCC initially required interconnected VoIP providers to obtain the agency's approval of their traffic studies before using them to calculate universal-service payments. *VoIP USF Order*, 21 FCC Rcd at 7547 ¶ 57. The D.C. Circuit, however, vacated the agency's preapproval requirement. *Vonage Holdings Corp.*, 489 F.3d at 1243-44. Accordingly, interconnected VoIP providers currently may use traffic studies to calculate the amount of their universal-service contribution without the FCC's prior approval.

for calculating contributions to the state fund, the NPSC provided that "[i]nterconnected VoIP service providers can elect the same options provided by the FCC" in the *VoIP USF Order*: They can use (1) the safe harbor set forth in the *VoIP USF Order* under which 35.1 percent of their revenues are allocated to the intrastate jurisdiction (calculated by subtracting the federal safe-harbor amount (64.9 percent) from 100 percent); (2) their actual intrastate revenues; or (3) intrastate revenues determined through an FCC-approved traffic study. *Id.* at 13. Under the NPSC's rules, "the customer's billing address should be used to determine [the] state with which to associate telecommunications revenues of an interconnected VoIP service provider." *Id.* at 14.

4. On December 20, 2007, Vonage filed a complaint in the U.S. District Court for the District of Nebraska to challenge the validity of the *NPSC USF Order*. On March 3, 2008, the district court granted Vonage's request for a preliminary injunction prohibiting the NPSC from enforcing its contribution requirements against Vonage. *Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 543 F. Supp. 2d 1062 (D. Neb. 2008).

The district court concluded that Vonage was entitled to a preliminary injunction because it was likely to succeed on the merits of its argument that the rationale of the *Vonage Preemption Order* preempted the *NPSC USF Order*. The district court acknowledged that the *Vonage Preemption Order* had not